132-337

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1067. ~~888-890~~ 116

WOLF BACHRACK, PLAINTIFF IN ERROR,

vs.

ANTHONY B. NORTON, A. A. WHISSEN, JAMES BENTLEY, MOSES ULLMAN, S. M. DODD, MARCUS DODD AND HAMILTON DOUGHADAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 4, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. P. McCormick, one of the judges of the circuit, and judge of the district court of the United States in and for the northern district of Texas, at chambers, Graham, Texas, this 27 day of July, 1886.

A. P. McCORMICK, *Judge.*

[The Seal of the U. S. Circuit Court, Northern Dist., Texas, Dallas.]

Attest: A. J. HOUSTON,
Clerk of said Circuit Court.

c STATE OF TEXAS, *Dallas County:*

I, R. C. Goodman, being first duly sworn, do depose and say that I have this day delivered to M. L. Crawford, a member of the firm of Crawford & Carwford, attorneys, a true copy of the citation in error in the case of Wolf Backrack *vs.* A. B. Norton *et al.*, signed by the Hon. A. P. McCormick, United States district judge for the northern district of Texas, of date the 27 day of July, 1886, attested by A. J. Houston, with the seal of said circuit court, at Dallas, Texas, July 27, 1886, and that I am not a party to said suit or in anywise interested therein, and that the original citation of said copy delivered to said M. L. Crawford is hereto attached and returned with this my affidavit.

A. C. GOODMAN.

Sworn to & subscribed before me this 29th day of July, 1886.

A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas, Texas,
By JAS. D. ADAMS,
Deputy Clerk.

[Endorsed:] No. 418. Wolf Backrack *vs.* A. B. Norton *et al.* Citation in error. Filed July 29, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

1 In the United States Circuit Court for the 5th Judicial Circuit and Northern District of Texas, Holding Sessions at Dallas.

A. B. NORTON *et al.*, Plaintiffs in Error,

vs.

WOLF BACHRACK, Defendant in Error.

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court for the northern district of Texas, at the city of Dallas, in Dallas county and said district, on the 17th day of May, A. D. 1886, it being the third Monday in said month in said year, and the day fixed by law for commencing a regular term of said court, at said place—present and presiding, the Honorable Andrew P. McCormick, United States district judge for the northern district of Texas; C. B. Pearre, United

States attorny for said district; W. L. Cabell, United States marshal for said district, and A. J. Houston, clerk of said court—when and where the following proceedings were had to wit:

STATE OF TEXAS, *Dallas County:*

2 *Amended Petition. Filed Dec. 17th, 1883.*

In U. S. Circuit Court, Northern District of Texas. — Term A. D. 1883.

To hon. said court:

Now comes plaintiff, Wolf Bachrack, a resident of the city of St. Louis and State of Missouri, leave of the court being first had, and files this his first amended original petition in lieu of and amending his original petition in this cause filed prior to its removal to this court, on, to wit, the 7th day of October, 1882. Plaintiff complains of Anthony B. Norton, A. A. Whissen, James Bentley, and Moses Ullman, who reside in Dallas county, Texas, and of Dodd, Brown & Co., a firm composed of Samuel M. Dodd, Marcus Dodd, and Hamilton Doughady, all of whom reside in the city of St. Louis and State of Missouri, and do business in said last-named State and city as partners in trade under said firm name of Dodd, Brown & Co., and plaintiff says:

That said defendant Norton, from about the first day of May, 1879, to about the — day of ——, 188–, was the marshall of the United States for the northern district of Texas, duly and legally appointed, qualified, and acting as such; that from about said first day of May, 1879, to said — day of ——, 188–, defendant Whissen was the duly and legally appointed, qualified, and acting deputy of said
3 defendant Norton; that defendants, Ullman & Bentley, on or about the first day of May, 1879, together with defendant Norton, made, signed, seal, and executed a bond (a substantial copy of which is hereto attached, marked Exhibit B, and made part of this petition) in the sum of twenty thousand dollars, payable and conditioned as required by law, for the faithful performance of the duties of United States marshall for the northern district of Texas by the said Norton and his deputies. Said defendents, Ullman and Bentley, remained bound for the acts of said Norton and his deputies in said office of United States marshall for said district until the — day of ——, 188–; that on or about the seventh day of December, A. D. 1880, a writ of attachment was issued out of the United States circuit court for the northern district [of] Texas, at Dallas, at the suit of Dodd, Brown & Co., composed as aforesaid, against one M. Myerson, directed to the marshall of the northern district of Texas, commanding him to attach so much of the property of the said M. Meyerson as should be of value sufficient to make the sum of fifteen hundred and sixty-two and $\frac{21}{100}$ dollars and the probable costs of suit. On or about said day of issuance of said writ the same was by said Dodd, Brown & Co. placed in the hands of said Norton in his capacity as marshall as aforesaid, and on or about the eighth day of December, A. D. 1880, said Norton being there and then marshall as aforesaid, said

4 Whissen being then and there his said deputy as aforesaid, said Bentley & Ullman being then and there bound for the acts of said Norton and his deputies, as aforesaid; said writ was by said Norton, acting through his said deputy, Whissen, and acting under color of his said office, and in violation of his duty as said marshall and in violation of his said bond and the terms and conditions thereof, levied upon certain goods, wares, and merchandise and property, a particular description of which is shown in said marshall's return to said writ, a certified copy of which writ and returns is hereto attached, marked Exhibit A, and made part of this petition. Said levy was made by said marshall by his said deputy, Whissen, forcibly entering upon the premises then held by plaintiff and forcibly and without plaintiff's consent taking plaintiff's said goods, wares, merchandise, and property from and out of plaintiff's possession and from and out of the possession of his agents, who were holding the same for him; all of which occurred in the county of Grayson, and State of Texas. At the time said Norton, through said Whissen, levied upon and took into his possession said goods and property above-described he, through said Whissen, at the same time and place, forcibly took from plaintiff and from his agents holding for him, he, the said Norton, then and there professsing to act by virtue of said writ of attachment, and as said United States marshall, his books of accounts and invoice

5 books, containing all the accounts and the invoices of the goods; that at the time of said seizure of said goods, property and books they were each and all the property of plaintiff, and not of said Meyerson, for that said Meyerson, by a deed of assignment, a substantial copy of which, except the schedules, is hereto attached, marked Exhibit C, and made part hereof, did on or about the 22d day of October, 1880, assign, transfer, and convey to plaintiff all his property subject to execution under the laws of the State of Texas, including the goods, property and books seized and taken into his possession by defendent Norton, through his said deputy, Whissen. Plaintiff alleges that at the time of the making of said assignment he was a resident of the city of St. Louis and State of Missouri; but that, while holding his domicil in said State last named, his business lay in the State of Texas, and for the greater part of the year before and since said time of the making of said assignment he was in said State of Texas in pursuance of his calling in said State; that at, before, and since the time of said assignment he was, in pursuance of his calling, frequently in said county of Grayson, in which county he had business interests. At the time of making of said assignment said Meyerson was a resident of Grayson county, Texas, where he was conducting his business, and where said goods, wares and property, before and at the time of making said assign-

6 ment, were situated, and where said assignment was made. Plaintiff further alleges that he accepted the trust under said assignment; that the assignee's bond was fixed by the Hon. S. D. Steedman, judge of the county court of Grayson county, at the sum of three thousand dollars; that plaintiff executed said bond in the said sum of three thousand dollars, conditioned as required by law;

that there executed said bond with him, as sureties upon the same, E. M. Hemstadt and Patty, Joiner & Co., a firm composed of T. D. Joiner and W. F. Patty, all of whom, at the time of making said assignment and bond resided in said Grayson county, Texas, and all of whom are still residents of Texas; said bond was duly and properly filed with said deed of assignment, with the clerk of the county court of Grayson county, having heretofore been approved by the Hon S. D. Steedman, judge of said county court of said Grayson county, a substantial copy of said bond, together with its several indorsements, is hereto attached, marked Exhibit D, and made part hereof. Said assignment was made to plaintiff, as assignee, for the benefit of such of the creditors of the said M. Meyerson as would consent to accept said assignment and release said Meyerson from the balance of their claims, after receiving their *pro rata* shares of the proceeds of the property conveyed by said assignment. Said Meyerson at the time of making said assignment was insolvent, and a
7 sufficient number of creditors of the said Myerson have accepted said assignment, according to the provisions thereof, to consume the entire property assigned in the payment of their claims. Said property and goods *was* at the time of the seizure thereof by the said Norton, as hereinbefore set forth, situated in said Grayson county, and remained there from the date of said seizure until the — day of ——, 1881, in the possession of the said Norton, at which last-named date said Norton, through his said deputy, Whissen, under an order of said United States circuit court, based on and flowing out of said attachment proceeding, sold all of said goods, wares, merchandise, and property except said books; and the proceeds of said sale or any part thereof, and said books or any of them, and said property or any part thereof, have never been delivered to plaintiff, though he has made demand of the same. All of said accounts by this time have become barred by the statute of limitation-, and by reason, of the unlawful deprivation of plaintiff of his said books he has become unable to ascertain and make out and collect said accounts and the same have become lost to him. The property described in said return of said marshall was at the time he levied upon the same and took it into his possession reasonably worth one-half more than the amounts set opposite the several items thereof in said return, said amounts being the values the said mar-
8 shall, through his deputy affixed, to the articles in making said levy. The books seized by said marshall as aforesaid were at the time of the seizure of the reasonable value of three thousand dollars. Plaintiff further alleges that said goods, wares, and property and books were levied on, seized, and sold by said marshall as aforesaid at the special instance and request of the said Dodd Brown & Co., composed as aforesaid; that said Dodd, Brown & Co. pointed out said goods to said marshall and directed him to levy upon the same by virtue of said attachment issued at their said suit. Premises stated, plaintiff says he is reasonably damaged in the sum of ten thousand dollars, the same or any part of which each and all of the defendants have failed and refused to pay.

Wherefore plaintiff prays for citation; and, upon final hearing,

for judgment, his damages, interest, and costs of suit, and general or special relief.

HARE & HEAD & F. C. DILLARD,
Att'ys for Pl't'ff, Wolf Bachrack.

(Endorsed:) No. 418. Wolf Bachrack *vs.* A. B. Norton *et al.* Amended original petition. Filed Dec. 17th, 1883. A. J. Houston, clerk.

EXHIBIT A.

Writ of Attachment. Issued Dec. 7th, 1880. *Executed Dec. 8th,* 1880. *Returned and Filed Dec. 16th,* 1880.

UNITED STATES OF AMERICA, *Northern District of Texas:*

9 The President of the United States to the marshall of the northern district of Texas, Greeting:

You are hereby commanded to forthwith attach so much of the property of M. Myerson, if to be found in your district, repleviable *or* security, as shall be of value sufficient to make the sum of $1,562.21 (fifteen hundred and sixty-two dollars and twenty-one cents) and the probable costs of suit, to satisfy the demand of Samuel M. Dodd, Marcus D. Dodd, and Hamilton Doughaday, composing the firm of Dodd, Brown and Company, and that you keep and secure the property so levied upon in your hands, unless replevied, that the same may be liable to further proceedings thereon, to be had before the honorable circuit court of the United States at Dallas, Texas, at a term commencing on the first Monday, it being the sixth day, of June, A. D. 1880, when and where you shall make known how you have executed this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States Supreme Court, and the seal of said circuit court, at Dallas, this 7th day of December, A. D. 1880.

[SEAL.] A. J. HOUSTON,
Clerk of said Circuit Court.

10 EXHIBIT "A."

11	white	shirts, @	1 00	11	00
37	"	"	42	15	54
7	"	" boys	50	3	50
24	"	"	30	7	20
16	"	"	50	8	00
20	"	"	30	6	00
7	"	"	30	2	10
4	"	"	50	2	00
1	"	"	75		75
1	"	"	50		50
3	"	"	62½	1	88
4	"	"	30	1	20
1	"	"	----		62
5	"	"	62½	3	12

1 " "	----		75
12 " "	25	3	00
9 cotton	25	2	25
3 " "	37½	1	12
1 percale "	----		62
30 cotton calico shirts	37½	11	25
8 " "	42	3	36
5 Canton U. shirts	58	2	90
4 " "	37½	1	50
5 cotton "	29	1	45
1 " "	----		21
2 wool drawers	1 12½	2	25
4 " "	42	1	68
6 undershirts	50	3	00
3 ladies' drawers	37½	1	13
2 marine shirts	50	1	00
10 India gauze shirts	25	2	50
36 " " "	16⅔	6	00
9 drill cotton drawers	33	2	97
3 colored shirts	66	1	98
5 drawers	1 00	5	00
2 lisle U. shirts	1 00	2	00
3 shirts	25		75
8 drill drawers	42	3	36
2 doz. shirt fronts	2 00	4	00
12 buck gloves	75	9	00
12 dog "	50	6	00
4 buck "	1 00	4	00
3 cloth "	25		75
5 " "	37½	1	37
2 damaged —	40		80
6 imported buck	30	1	80
15 dog skin	40	6	00
14 white cotton	08	1	12
11 3 gauntlets	75	2	25
1 "	----		50
5 "	75	3	75
35 gents' scarfs	46	16	10
13 " "	50	6	50
3½ doz. white ties	12½		42
17 silk tie scarfs	29	4	93
21 neckties	16		64
4 bows	10½		42
4 doz. fancy hose	50	2	00
1 " gents' "	----		40
1 " " "	----		60
1 " " "	----		65
3½ " " "	1 00	3	50
1 " " "	----	1	50
7 " " "	85	6	80
8 " " "			

3 p'r " "		50	1 50
9 suspenders		19	1 35
6 belts		25	1 50
10 suspenders		10½	1 05
6 "		21	1 26
6 "		25	1 50
4 "		33	1 32
5 "		15	75
10 "		22½	2 25
8 "		16	1 28
8 "		16	1 28
1 "			50
7 "		18	1 26
12 "		12½	1 50
3 "		21	63
18 yds. ticking		9½	1 71
12 " "		13½	1 62
50 " "		15	7 50
42 " "		13	5 46
10 " "		13	1 30
40 " "		16	6 40
24 " "		9½	2 28
14 " " remnants		13½	1 89
170 " prints		7	11 90
196 " brown cotton		7¼	14 21
83 " " "		7¼	6 02
22 " " "		4¼	93
61 " drilling		8¾	5 33
35 " cotton		6	2 10
33 p'rs men's drawers		25	8 25
10 " " "		21	2 10
4 " " "		25	1 00
2 " " shirts		40	80
11 cheviot "		25	2 75
12 " "		30	3 60
21 calico shirts		21	8 61
12 7 hickory shirts		25	1 75
14 over "		59	8 26
27 overshirts		50	13 50
5 "		65	3 25
13 "		50	6 50
25 overalls		37½	9 38
5 overshirts		60	3 00
10 overalls		66⅔	6 67
5 undershirts		21	1 05
4 drawers		20	80
1 doz. shirts			4 00
3c. paper collars	1 25		3 75
6 counterpanes		65	3 90
2 "	2 00		4 00
3 "	1 35		4 05

3	"		1 00	3 00
9¾	yds. flannel		27	2 63
10	" "		25	2 50
36	" "		32½	11 52
24	" "		16	3 84
14½	" "		25	3 63
25	" "		18	4 50
54	" "		14	7 56
11	" "		22½	2 48
14½	" "		16	2 32
5	counterpanes		1 25	6 25
47	yds. cotton jeans		22½	10 69
44	" " "		17	7 48
39	" " "		22½	8 78
40	" " "		16	6 40
35	" " "		11	3 85
11	" " "		20	2 20
6	" brown "		20	1 20
9	" " drill		7¾	6 88
8	" jeans		20	1 60
8	" "		11	88
3½	" cotton cass.		25	87
10	" cottonade		11	1 10
31¼	" white flannel		21	6 56
68	" Lonsdale cotton		13	8 84
20	" white flannel		15	3 00
6	" twill "		18	1 08
25	" " "		25	6 25
103	p'rs child's hose		6¼	6 44
96	yds. grass cloth		6½	6 24
23	pkgs. pins		50	11 50
20	yds. canton flannel		9½	1 90
	113	yds. linsey	12½	14 13
13	46	p'rs ladies' kids	50	23 00
	50	yds. canton flannel	8½	4 25
6	p'rs ladies' kids		1 12½	6 75
5	" "		50	2 50
15	" "		37½	5 62
46	yds. table linen, red		40	18 40
14	" " "		60	8 40
20	" crash		6	1 20
7	hdks.		15	1 05
9	"		18	1 62
2	"		16	32
7	"		12½	88
6	"		15	90
180	yds. glaze muslin		9	16 20
25	hdks.		15	3 75
50	yds. alpaca		18	9 00
6½	" "		50	3 25
34⅓	" "		37½	13 03

9¾ " "		42½	4 14
26 " "		35	9 10
15 " "		45	6 75
34½ hdks.		8½	2 89
18 "		18	3 24
36 yds. crinoline		9	3 24
10 hdks.		12½	1 25
61 wiggin		9	5 80
12 hdks.		5	60
24 yds. cheviot		9	2 16
21 "	plaid dress goods	18	3 78
15 "	sheeting	11	1 65
35 "	dress goods	30	10 50
42 "	"	20	8 40
46¼ "	"	30	13 88
49½ "	"	25	12 38
26 p'rs ladies' hose		14	3 64
3 "	"	16	48
19 "	pique	7½	6 97
9 "	"	15	1 35
54 "	"	12	6 75
8 "	"	10	80
25 "	"	22	5 50
14 "	"	17½	2 45
17 p'rs ladies' hose		22½	3 87
12 "	"	18	2 16
1 "	"	12	12
11 "	"	18	1 98
76 yds. lawn		15	11 40
4 p'rs ladies' hose		37½	1 50
88 yds. lawn		10	8 80
6 p'rs ladies' hose		57	3 42
220 yds. lawn		8	17 60
4 [p'rs] ladies' hose		20	80
11 [p'rs] ladies' hose		15	1 65
14 1 "	"		18
125 yds. dress goods		10	12 50
2 p'r hose		18	36
11 " "		12	1 32
220 yds. dress goods		12½	27 50
42 "	"	23	9 66
18 silk hdks.			13 00
36 dz. braid		9	3 24
1 "	gloves		75
8 "	"	12½	1 00
2 "	" child's	75	1 50
11 "	" misses'	12½	1 37
8½ gross buttons		50	4 25
10½ dress goods		12½	1 31
16 child's hose		12½	2 00
7 children's hose		15	1 05

10 yds. dress goods		7	70
3 p'r white gloves		8	24
12 dz. dress braid		45	5 40
2 ladies' corsets		62½	1 25
22 " "		37½	8 25
20 " "		40	8 00
2 " " stays		10	20
1 dz. braid		----	37
10 dz. cotton gloves		13	1 30
9 " lead pencil-		8½	75
1 " Roach combs		----	40
½ " " "		1 50	75
1 " " "		----	2 00
9 " tuck "		33	2 97
9 " " "		4	36
4 " " "		7	28
10 " " "		12	1 20
34½ yds. linsey		12½	4 31
72 " "		9	6 52
24 child's cotton hose		9	2 16
35½ yds. dress goods		6	2 13
5 " cheviot		9½	48
28 child's cotton hose		12½	3 50
1 p'r ladies' kids		----	1 00
32 yds. dress goods		10	3 20
44 p'r child's M. hose		20	8 80
106½ yds. dress goods		12½	13 34
9 wallets		10½	95
3 "		25	75
65 yds. imported cheviot		5	3 25
3 wallets		12½	37
6 wallets		60	3 60
15 3 wallets		20	60
4 "		27	1 68
5 wallets		50	2 50
4 "		35	1 40
120 yds. stripes & checks		8½	10 20
5 wallets		18	90
14 yds. hickory		9	1 26
3 " stay-binding		25	75
57 " col. cotton flannel		11	6 27
3 dz. napkins		40	1 20
1 table-cloth		----	1 15
16 bxs. lilly-white		6	96
4 dz. napkins		2 25	9 00
31 child's worsted hose		15	4 65
94 yds. gingham		11	10 34
10 child's hose		6	60
26 yds. cassimere		55	14 30
45 " "		42½	19 30
7 albums		65	4 55

50 yds. waterproof	70	35 00
7 dz. linen floss	7½	52
80 yds. cambric	7	5 60
53 " gingham chambrey	15	7 95
8 dz. dress braid	65	5 20
1 wallet	----	20
37 dz. cotton floss	7	2 59
42 " " "	10	4 20
164 yds. twill jeans	8	13 12
39 ladies' cotton gloves	12	4 88
1 gro. corset laces	----	50
6 dz. napkins	50	3 00
6 " spool thread	75	4 50
12 table-cloths	50	6 00
1 lot gloves	----	40
35 yds. toweling	7	2 45
1 safety-pins	----	65
5 bxs. hooks & eyes	10	50
5½ dz. thimbles	25	1 38
2½ " ladies' cotton hose	1 00	2 50
12 towels	35	4 20
19 ladies' corsets	62½	11 88
16 towels	21	3 36
3 dz. "	1 00	3 00
18 ladies' gloves	40	7 20
5 towels	12½	63
2 "	20	40
3 "	15	45
14 ladies' cotton gloves	12½	1 75
13 dz. napkins	1 00	13 00
4 " "	75	3 00
4 " towels	1 00	4 00
25 yds. crash	7	1 75
16 yds. crash	8	1 28
16 42 yds. crash	14	5 38
11 gents' hdks.	10	1 10
7 gents' hdks	10	70
7 tuck combs	12	1 20
7 " "	15	1 05
43 " "	10	4 30
20 fine "	5	1 00
8 pocket "	3	24
1 lot dress coat & buttons	----	40 00
9 ladies' ties	11	99
2 setts furs	40	80
1 lot embroidery	----	40 00
44 fans	10	4 40
1 lot elastic	----	3 00
1 baby cloak	----	1 50
8¼ yds. dress goods	15	1 24
55 " " "	10	5 50

68	"	"	"	18	12 24
46	"	"	"	12	5 78
7½	"	linen	"	45	3 37
11	"	"	"	30	3 30
15	"	"	"	45	6 75
16	"	Victoria lawn		12½	2 00
17	"	"	"	14	2 38
16	"	"	"	22	3 60
9	"	"	"	12	1 12
21	"	"	"	16	3 36
6 diapers				80	4 80
15 yds. check jaconet				13	1 95
12	"	"	"	16	1 92
18	"	Victoria lawn		14	2 52
19	"	"	"	16	3 04
1 lot remnants				----	1 00
81 yds. swiss				12½	1 06
12	"	"		4	48
14	"	"		15	2 10
27	"	"		12	3 37
4	"	"		10	40
5	"	"		15	75
16	"	"		10	1 60
16	"	"		20	3 20
5½	"	"		8	44
30	"	"		12	3 75
5	"	"		7	35
35 towels				35	11 25
4 ladies' skirts				1 00	4 00
33	"	"		75	24 75
	15 yds. linen			14	2 10
17	39 yds. veiling			25	9 75
	3 spoons & forks			----	1 00
2 shawls				2 00	4 00
4 ladies' hose				37	1 50
2 nubias				75	1 50
2 tureens				25	50
1 sett furs				----	3 50
1	"	"		----	65
1 lot sundries				----	2 50
8 ladies' hats				50	4 00
8	"	"		45	3 60
11	"	"		60	2 40
5	"	"		1 00	5 00
4	"	"		2 00	8 00
7	"	"		1 50	10 50
1	"	"		----	2 25
5	"	"		1 20	6 00
6	"	"		10	1 00
1	"	"			1 25
7	"	"		75	5 25

8	"		2 75	22 00
5	"		50	2 50
1	"		65	65
6	"		75	4 50
6	"		50	3 00
3	"		85	2 55
9	"		85	7 65
27	"		75	20 25
19	"		60	11 40
2	"		40	80
47	"		50	23 50
6	"		30	1 80
18	"		35	6 30
21	"		65	13 65
9	"		37	3 33
4	"		76	2 80
5	"		55	2 75
		Am't for'd		2,406 03
		Am't forward		2,406 03
18	p'rs	pants	1 50	21 00
7	"	"	2 50	17 50
10	"	"	4 75	47 50
6	"	"	1 40	8 40
24	"	"	1 25	30 00
2	"	"	1 75	
5	"	"	2	10 00
4	"	"	2	8 00
1	"	"		3 75
4	"	"	1 75	7 00
8	"	"	3 75	30 00
	10	p'rs pants	1 65	16 50
20	4	" "	1 30	5 20
	2	" "	1 80	3 60
3	p'rs	pants	1 25	3 75
5	"	"	2 00	10 00
3	"	"	1 60	4 80
2	"	"	3	6 00
3	"	"	1 50	4 50
5	"	"	2 25	11 25
5	"	"	1 50	7 50
26	coats		2 75	71 50
8	"		3 75	30 00
3	"		2 25	6 75
1	"			4 25
5	"		2 75	13 45
3	"		2 25	6 75
3	"		2 25	6 75
5	"		3 25	16 25
1	"			2 25

2	"	2		4 00
7	"	5	25	36 75
30	"	1	25	37 50
1	"			2 50
6	linen dusters	1	50	9 00
5	grass "		75	3 75
4	linen coats	1	40	5 60
5	coats	2		10 00
2	"	1	50	3 00
3	"	5	25	17 75
4	"	2	75	11 00
6	"	3		18 00
2	overcoats	6		12 00
1	"	7		7 00
86	vests	1	33	115 58
10	p'rs boots	1		10 00
32	" "	1	37	43 84
8	" "	2	00	16 00
3	" "	2	50	7 50
7	" "	1	75	12 25
3	" "	1	55	4 65
5	" "	1	10	5 50
29	" shoes	1	10	31 90
10	" "		88	8 80
16	" boys' brogans		87	14 00
25	" woman's kip polkas		65	16 25
24	" misses' " "		70	16 40
27	" " " "		60	4 20
11	" men's " boots		62	6 89
	4 p'rs men's kip boots	2	50	10 00
21	21 p'r misses buff shoes		65	13 65
	24 " woman's " "		82	19 80
10	p'r woman's kip shoes		90	9 00
16	" " buff "		87	14 00
50	" " kip polka shoes		80	40 00
14	" men's plow "	1	10	15 40
5	" woman's buff "		75	3 75
11	" assorted split "		60	3 60
41	" men's brogans "	1	12½	46 13
24	" " " "		90	21 60
6	" " boots	2	25	13 50
11	p'rs P. calf "	3	00	33 00
6	" " "	2	50	15 00
4	" " "	2	00	8 00
8	" m'x'd split	1	50	12 00
1	lot wrapping paper			2 00
2½	dz. straw hats	1	00	2 50
4	p'r men's boots	1	50	6 00
3	" " damaged		50	1 50
1	lot artificial flowers			7 65
1	" ladies' trimmed hats			55 00

17 skirts		40	6 80
11 "		75	9 00
6 sacques		75	4 50
7 comforts		25	1 75
2 shawls	2		4 00
3 "	1		3 00
32 chromos		50	16 00
3 ladies' linen suits	2		16 00
4 " valises	1		4 00
1 lot goods in show-case		----	20 00
14 dz. twist		20	2 80
23 " silk thread	1	10	25 30
1 lot needles		----	2 00
23 doz. skeins silk floss		10	2 30
20 trunks	3		60 00
1 looking-glass		----	2 50
1 lot dolls		----	140 92
16 wall pockets		37	6 00
1 table cover		----	40
2 bridal wreaths	1		2 00
8 misses' furs		50	4 00
1 lot trunk-, &c.		----	10 00
9 dolls		20	1 80
4 show-cases		----	75 00
10 tables	5		50 00
1 desk & awning		----	25 00
4 stands	5		20 00
1 stove		----	10 00
Total amount of invoice		----	4,128 51

22 Came to hand Dec. 7th, 1880, and executed Dec. 8th, 1880, by levying on the personal property in possession of defendant as the property of defendant, as shown in Exhibit "A" and made a part of this return.

All of which property is now in my possession subject to the further order of the court.

A. B. NORTON,
U. S. Marshal, N. D. Texas,
By A. A. WHISSEN, *Dep'ty.*

(Endorsed:) No. 108. U. S. cir. court, Dallas. Dodd, Brown & Co. *vs.* M. Myerson. Issued Dec. 7th, 1880. A. J. Houston, clerk. Filed Dec. 16th, 1880. A. J. Houston, clerk.

Circuit Court of the United States for the Northern District of Texas, at Dallas.

I, A. J. Houston, clerk of the circuit court of the United States for the northern district of Texas, at Dallas, do hereby certify that the foregoing is a full, true, and correct transcript of the original writ of attachment, with the return of the marshal thereon, in case

No. 109 and styled Dodd, Brown & Company *vs.* M. Myerson, all of which appears from the records of said court now in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Dallas, Texas, this 18th day of January, A.
23 D. 188–, and of the Independence of the United States of America the 105th year.

A. J. HOUSTON,
Clerk of said Court.

(Endorsed:) No. 109. U. S. circuit court, northern district of Texas, at Dallas. Dodd, Brown & Co. *vs.* M. Myerson. Certified copy of attachment and return.

EXHIBIT "B."

U. S. Marshal's Bond.

Know all men by these presents that we, Anthony B. Norton, James Bentley, and Moses Ullman, of the town of Dallas, in the State of Texas, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the said United States, to be paid to the said United States; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this 1st day of May, 1879.

The condition of the above obligation is such — whereas the President of the United States hath, pursuant to law, appointed the said Anthony B. Norton to be marshall of the United States for the northern district of Texas, to have and to hold the same, with all rights, privileges, and emoluments thereunto lawfully appertaining, for four years from the second day of April, 1879,
24 unless sooner removed therefrom, as by a commission to him, bearing date the 2nd day of April, 1879, more fully appears.

Now, if the said Anthony B. Norton, by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal, then this obligation to be void; otherwise to remain in full force and virtue.

ANTHONY B. NORTON. [SEAL.]
JAMES BENTLEY. [SEAL.]
MOSES ULLMAN. [SEAL.]

UNITED STATES OF AMERICA, } ss:
Northern District of Texas, }

Be it remembered that on this 1st day of May, A. D. 1879, personally came before me Anthony B. Norton, James Bentley, and Moses Ullman, and severally acknowledged that they executed the foregoing bond, and I certify that they are the same persons described in and who executed the said bond.

A. P. McCORMICK,
United States Dist. Judge of the Northern Dist. of Texas.

UNITED STATES OF AMERICA, } ss:
Northern District of Texas, }

James Bentley and Moses Ullman, being duly and severally sworn, depose and say, each for himself, that he is a resident and freeholder in the State of and northern district of Texas, and
25 is worth the sum of ten thousand dollars over and above all his debts and liabilities and exemptions.

JAMES BENTLEY.
MOSES ULLMAN.

Subscribed and sworn to this 1st day of May, A. D. 1879, before me—

A. P. McCORMICK,
United States District Judge for Northern District of Texas.

Approved: A. P. McCORMICK,
U. S. District Judge for Northern District of Texas.

(Endorsed:) Bond of A. B. Norton, United States marshal, northern d't Texas. Filed May 22d, 1879. A. J. Houston, clerk U. S. cir. court, Dallas, Texas.

U. S. Marshal's Oath.

I, Anthony B. Norton, of Dallas, in the county of Dallas, State of Texas, having been appointed United States marshal for the northern district of Texas, do solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntar-ly given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever under any authority, power or constitution within the United States hostile or
26 inimical thereto; and I do further swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.

A. B. NORTON.

Sworn and subscribed before me this 1st day of May, 1879.

A. P. McCORMICK,
U. S. District Judge, Northern District of Texas.

U. S. Marshal's Oath.

I, Anthony B. Norton, do solemnly swear that I will faithfully execute all lawful precepts directed to the marshal of the northern district of Texas, under the authority of the United States, and true return make, and in all things well and truly and without malice

or partiality perform the duties of the office of marshall of the northern district of Texas during my continuance in said office, and take only my lawful fees, so help me God.

A. B. NORTON.

Sworn to and subscribed before me this 1st day of May, A. D 1879.

A. P. McCORMICK,
U. S. District Judge, Northern District of Texas.

27 (Endorsed:) Oath of office of Anthony B. Norton as U. S. marshal, N. D. T. Dated May 1st, 1879. Filed May 22d, 1879. A. J. Houston, clerk U. S. circuit court, Dallas, Texas.

Circuit Court of the United States for the Northern District of Texas, at Dallas.

I, A. J. Houston, clerk of the circuit court of the United States for the northern district of Texas, at Dallas, do hereby certify that the foregoing is a full, true, and correct transcript of the official bond of A. B. Norton, United States marshal for the northern district of Texas, all of which appears from the records of said court now in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Dallas, Texas, this 18th day of January, A. D. 1881, and of the Independence of the United States of America the 105th year.

[SEAL.] A. J. HOUSTON,
Clerk of said Court.

(Endorsed:) Exhibit B. U. S. circuit court, northern district of Texas, at Dallas. Certified copy of official bond of A. B. Norton, U. S. marshal

EXHIBIT "C."

Assignment.

THE STATE OF TEXAS, *County of Grayson:*

28 Know all men by these [presents] that I, M. Myerson, of Grayson county, Texas, being largely indebted and insolvent, and being desirous of securing a fair, just, and equitable distribution of my property among my creditors, and in consideration of the sum of five dollars to me in hand paid, I have this day bargained, sold, and conveyed, and do hereby bargain, sell, and convey, and assign unto Wolf Bachrach, of the county of St. Louis, State of Missouri, all my property of every kind and wheresoever situated, except such part thereof as is exempt from execution by the laws of Texas, and I do specially so convey and assign to said Wolf Bachrach my entire stock of goods, situated in a store on North Travis street, in Sherman, Texas, rented by me from Tom Forbes, Sr., and known as the Dollar Store; also all debts of every kind, due or owing to me, whether upon notes, acceptances, open accounts, or otherwise. An inventory of the property owned by me will be made out and

attached hereto after the execution hereof, but this instrument is to take effect instanter upon the signing hereof, and before said inventory is made.

This conveyance is, however, an assignment and in trust for the following purpose, to wit:

The said Wolf Bachrach is, immediately upon the execution of this instrument, to take possession of all the property herein conveyed; shall execute a bond as such assignee according to the laws of Texas; shall convert all of said property into cash as soon as it can be done consistently with the interests of all parties; shall collect all debts due me, and shall apply the proceeds of said property and debts to the payment *pro rata* of all my creditors who will consent to accept their proportional share of my estate and discharge me from their respective claims, and this assignment shall be for the benefit of all such creditors and none others; my said estate to be administered and be paid out in all things in compliance with the laws of Texas governing such assignments. An inventory of my creditors, in compliance with law, is hereto attached and made a part of this instrument.

Witness my hand this the 22nd Oct., 1880.

M. MYERSON.

EXHIBIT "D."

Assignee's Bond.

THE STATE OF TEXAS, *County of Grayson:*

Know all men by these presents that we, Wolf Bachrach, as principal, and —— ——, as sureties, acknowledge ourselves bound to the State of Texas in the sum of three thousand dollars; for the payment of which, well and truly to be made, we bind ourselves by these presents.

Witness our hands this 22nd day of October, 1880.

The above bond is conditional as follows:

Wolf Bachrach has this day been made assignee by M. Myerson, and has accepted said assigneeship. Now, if said Bachrach will faithfully discharge his duties as such assignee, and shall make proportional distribution of the net proceeds of said estate among the creditors entitled thereto according to the statute of Texas governing such assignments, then this obligation shall be null and void; otherwise, it shall remain in full force and effect.

Witness our hands this the 22nd day of October, A. D. 1880.

WOLF BACHRACH.
E. M. HERNSTADT.
PATTY, JOINER & CO.

Approved Oct. 23d, 1880.
S. D. STEEDMAN,
Co. Judge.

(Endorsed:) Filed Octo. 23d, 1880. G. A. Dickenson, clerk.

Amended Answer. Filed Feb'y 18, 1885.

WOLF BACHRACK
v.
A. B. NORTON *et als.* } 418.

Suit pending in the U. S. C. C., at Dallas, Tex.

Now comes the defendants in the above-entitled cause and, by leave of the court, amend their answer in this cause, heretofore filed, and say that the matters and things as stated in plaintiff's petition are insufficient in law for him to have or maintain his said suit, and of this defendants pray the judgment of the court.

CRAWFORD & CRAWFORD &
L. F. SMITH,
Att'ys for Def'ts.

And, for special exception to said petition, defendants say that the plaintiff shows by the allegations of his petition that he is and has been since before 1878 a citizen of the State of Missouri and
31 a non-resident of the State of Texas, and that he claims title to the goods, wares, and merchandise and books mentioned in his petition under and by virtue of a deed of assignment executed by M. Myerson to the plaintiff on Octo. 22d, 1880. And defendants say that said assignment is void on its face for the following reasons:

First. Said assignment shows that at the time it was executed the assignee, Wolf Bachrack, was a non-resident of the State of Texas and was a citizen of the State of Missouri.

Second. Said assignment was to take effect instanter upon its signing, and the assignee by its terms is directed to take possession of all the property immediately upon the execution of the assignment.

Third. By the terms of said assignment — is clothed with a discretion to determine the time when the assigned property shall be sold.

Fourth. The assignment is in other respects in conflict with the law.

CRAWFORD & CRAWFORD &
L. F. SMITH,
Att'ys for Def'ts.

And, answering, defendants deny all and singular the allegations in plaintiff's petition, and demand proof.

CRAWFORD & CRAWFORD,
L. F. SMITH,
Att'ys for Def'ts.

And, further answering, defendants say that the said M.
32 Myerson, at the date of execution of said assignment, was not insolvent nor in contemplation of insolvency, but that the said assignment was and is fraudulent in fact, and was made for the purpose of hindering, delaying, and defrauding the creditors of M.

Myerson (and especially Dodd, Brown & Co., who were creditors of Myerson) in the collection of their debts against the said Myerson.

CRAWFORD AND CRAWFORD,
L. F. SMITH,
Att'ys for Def'ts.

(Endorsed:) No. 418. Wolf Bachrack *vs.* A. B. Norton *et als.* Amended original answer. Filed Feb'y 18th, 1885. A. J. Houston, clerk. C. C. and L. F. S.

Demurrer to Def'ts' Answer. Filed June 10th, 1886.

WOLF BACHRACK *vs.* A. B. NORTON *et al.*

And now comes plaintiff in the above cause and demurs to that portion of def't- answer herein setting up fraud in the assignment described in pl't'ff- petition, because the same is not sufficient to show the invalidity of such assignment and is no defense to his suit, and of this he prays judgment.

HARE, HEAD AND HARE,
H. Y. ROBERTSON,
Att'ys for Pl't'ff.

(Endorsed:) No. 418. Wolf Bachrack *vs.* A. B. Norton *et al.* Demurrer to def'ts' answer. Filed June 10th, 1886. A. J. Houston, clerk, by Jas. D. Adams, dep'ty.

33 *Judgment. Entered June 10th,* 1886.

WOLF BACHRACK
vs.
A. B. NORTON *et al.* } No. 418.

JUNE 10TH, 1886.

This cause, coming on this day to be heard, came the parties, plaintiff and defendants, by their attorneys, and announced ready for trial; and defendants' general demurrer and (4) four special demurrers, filed Feb'y 18, 1885, and set out in full in their amended original answer, having been presented and fully considered by this court, it is ordered by this court that each and all of said demurrers be sustained, and to the action of this court in sustaining the same plaintiff then and there excepted, and the plaintiff having declined to amend, said cause was by this court dismissed on the ground that said amended petition of plaintiff, filed Dec. 17th, 1883, showed no cause of action, and that the assignment therein set out from S. M. Myerson to Wolf Bachrack was on its face null and void, and to which action of this court in dismissing said cause plaintiff then and there excepted; it is therefore ordered by the court that plaintiff, Wolf Bachrack, take nothing by his suit against A. B. Norton, A. A. Whissen, James Bentley, Moses Ullman, S. M. Dodd, and Marcus Dodd, and Hamilton Doughaday, and that defendants go hence without day and recover of said plaintiff their costs in this behalf expended.

Assignment of Errors. Filed July 29th, 1886.

WOLF BACHRACK *vs.* A. B. NORTON *et al.*

Be it remembered that on the trial of the above-entitled cause the pl'ff presented and read to the court his amended original petition filed in this cause December 17th, 1883, to which the defendants interposed a general demurrer and special exceptions, which
34 were sustained by the court; and the plaintiff, having declined to amend, the cause was by the court dismissed.

From this action of the court this appeal is taken and assigned as error.

Plaintiff's petition set out as his cause of action a trespass and conversion by A. B. Norton, marshal of the northern district of of Texas, through his deputy, A. A. Whissen, of a stock of goods, wares, and merchandise belonging to plaintiff. The bondsmen of the marshal are made parties defendant, and also Dodd, Brown & Co., attaching creditors, under whose writ and at whose instigation the seizure is alleged to have been made. The plaintiff plead his title or claim to the property seized and alleged that he held and owned it by virtue of a deed of assignment made to him by one M. Myerson, against whom the attachment of Dodd, Brown & Co. was sued out, and by virtue of which the property was seized. This deed of assignment was made a part of the petition, and the general and special demurrers of defendants, which were sustained, raises the question of its validity. The action of this court in holding the assignment void and dismissing the petition is the alleged error, to correct which this writ is presented, and which is here and now assigned as error.

The deed of assignment so held void is as follows:

"THE STATE OF TEXAS, *County of Grayson:*

35 "Know all men by these that I, M. Meyerson, of Grayson county, Texas, being largely indebted and insolvent, and being desirous of securing a fair, just, and equitable distribution of my property among my creditors, and in consideration of the sum of five dollars to me in hand paid, *I* have this day bargained, sold, and conveyed, and do hereby bargain, sell, and convey and assign, unto Wolf Bachrack, of the county of St. Louis, State of Mo., all my property of every kind and wheresoever situated, except such part thereof as is exempt from execution by the laws of Texas, and I do specially so convey and assign to said Wolf Bachrack my entire stock of goods situated in a store on North Travis street in Sherman, Texas, rented by me from Tom Forbes, Sr., and known as the Dollar Store; also all debts of every kind due or owing to me, whether upon notes accepted as open or otherwise. An inventory of the property owned by me will be made out and attached hereto after the execution hereof, but this instrument is to take effect instanter upon the signing hereof and before said inventory is made. This conveyance is, however, an assignment and in trust for the following purposes, to wit: The said Wolf Bachrack is, immediately upon the

execution of this instrument, to take possession of all the property herein conveyed, shall execute a bond as such assignee according to the laws of Texas, shall convert — of said property
36 into cash as soon as it can be done consistently with the interests of all parties, shall collect all debts due, and shall apply the proceeds of said property and debts to the payment *pro rata* of all my creditors who will consent to accept their proportional share of my estate and discharge me from their respective claims, and this assignment shall be for the benefit of all such creditors and none others; my said estate to be administered and be paid out in all things in compliance with the laws of Texas governing such assignments. An inventory of my creditors in compliance with the laws is hereto attached and made a part of this instrument.

"Witness my hand this 22nd Oct., 1880.

"Copy. M. MYERSON."

The special exceptions containing those objections urged to the validity of said assignment is as follows:

"And for special exception to said petition defendants say that plaintiff shows by the allegations of his petition that he is and has been since before 1878 a citizen of the State of Missouri and a non-resident of the State of Texas, and that he claims title to the goods, wares, and merchandise and books mentioned in his petition under and by virtue of a deed of assignment executed by M. Myerson to the plaintiff on Oct. 22nd, 1880, and defendants say that said assignment is void on its face for the following reasons:

37 1st. Said assignment shows that at the time it was executed the assignee, Wolf Bachrack, was a non-resident of the State of Texas and was a citizen of the State of Missouri.

2nd. Said assignment was to take effect instanter upon its signing, and the assignee by its terms is directed to take possession of all the property immediately upon the execution of the assignment.

3rd. By the terms of the assignment the assignee is clothed with a discretion to determine the time when the assigned property shall be sold.

4th. The assignment is in other respects in conflict with law.

For this error of the court in sustaining the demurrer and their exceptions, and declaring the deed of assignment void, plaintiff asks that the case be reversed and remanded for further proceedings in the circuit court.

H. G. ROBERTSON,
Att'y for Plaintiff, Wolf Bachrack.

(Endorsed:) No. 418. Wolf Bachrack *vs.* A. B. Norton *et al.* Assignment of error. Filed July 29, 1886. A. J. Houston, clerk, by Jas. D. Adams, dep-ty.

Petition for Writ of Error. Filed July 29, 1886.

UNITED STATES OF AMERICA, *Northern District of Texas:*

To the hon. justices of the Supreme Court of the United States:

38 And now comes Wolf Bachrack, by H. G. Robertson, his attorney, and complains that in the record and proceedings and also in the rendition of judgment in this suit between Wolf Bachrack, plaintiff, and A. B. Norton, A. A. Whissen, James Bentley, Moses Ullman, S. M. Dodd, Marcus Dodd, and Hamilton Daughaday as defendants, tried in the circuit court of the United States for said northern district of Texas, holding sessions at Dallas, in said district, at the May term thereof, A. D. 1886, and in which judgment was rendered against the said Wolf Bachrack, plaintiff, on the 10th day of June, A. D. 1886, manifest error has appeared, to the great damage of said Wolf Bachrack, plaintiff. Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

H. G. ROBERTSON,
Attorney for Wolf Bachrack, Plaintiff.

Allowed July 27th, 1886.
A. P. McCORMICK, *Judge.*

(Endorsed:) No. 418. Wolf Bachrack, pl'ff in error, *vs.* A. B. Norton *et al.*, def'ts in error. Petition for writ of error. Filed July 29th, 1886. A. J. Houston, clerk, by Jas. D. Adams, dept.

39 *Writ-of-Error Bond. Filed July 29, 1886.*

WOLF BACHRACK, Plaintiff in Error,

vs.

A. B. NORTON, Defendants in Error.

Bond for writ of error to the Supreme Court of the United States, prosecuted from the circuit court of the United States for the northern district of Texas.

Know all men by these presents that we, Wolf Bachrack, as principal, and Philip Sanger and W. O. Conner, as surities, are held and firmly bound unto A. B. Norton, A. A. Whissen, James Bentley, Moses Ullman, and S. M. Dodd, Marcus Dodd, and Hamilton Daughaday, defendants in writ of error, in the sum of one thousand dollars, to be paid to said last-named parties, defendants aforesaid, their executors, administrators, or legal representatives; to which payment, well and truly to be made, we bind ourselves, and each of us, as principal and surities aforesaid, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Whereas the above-named Wolf Bachrack has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Texas, at Dallas:

Now, therefore, the condition of this obligation is such that if the above-named Wolf Bachrack shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain
40 in full force and virtue.

Witness our hands this 23rd day of July, 1886.

WOLF BACHRACK,
By his attorney, H. G. ROBINSON.
PHILLIP SANGER.
W. O. CONNER.

UNITED STATES OF AMERICA,
Northern District of Texas, at Dallas:

Phillip Sanger and W. O. Connor, sureties to the above writ-of-error bond, being duly sworn, depose and say, and each for hinself saith, that he is worth the sum of one thousand dollars over and above all exemptions and all his just debts and liabilities.

PHILLIP SANGER.
W. O. CONNOR.

Sworn to and subscribed before me this 23rd day of July, 1886.

A. J. HOUSTON,
Clerk U. S. Circuit Court, Dallas, Texas.

Approved July 27th, 1886.
A. P. McCORMICK, *Judge.*

(Endorsed:) No. 418. Wolf Bachrack *vs.* A. B. Norton *et al.* Writ-of-error bond. Filed July 29th, 1886. A. J. Houston, clerk, by Jas. D. Adams, dept.

41 *Citation in Error. Filed July 29th,* 1886.

UNITED STATES OF AMERICA:

To the defendants, A. B. Norton, A. A. Whissen, James Bentley, Moses Ullman, S. M. Dodd, Marcus Dodd, and Hamilton Doughaday, or their att'ys of record, Mess. Crawford and Crawford, a firm of lawyers composed of W. L. Crawford and M. L. Crawford, residents of the city and county of Dallas, State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, District of Columbia, on the 2nd Monday in October, A. D. 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, wherein Wolf Backrack is plaintiff, and you, the above-named parties, as parties, are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. P. McCormick, one of the judges of the cir-

cuit and judge of the district court of the United States in and for the northern district of Texas, at chambers, Graham, Texas, this 27th day of July, 1886.

[SEAL.] A. P. McCORMICK, *Judge.*

Attest: A. J. HOUSTON,
Clerk of Circuit Court.

42 *Return.*

STATE OF TEXAS, *Dallas County*:

I, R. C. Goodman, being first duly sworn, do depose and say that I have this day delivered to M. L. Crawford, a member of the firm of Crawford & Crawford, attorneys, a true copy of the citation in error in the case of Wolf Backrack *vs.* A. B. Norton *et al.*, signed by his Hon. A. P. McCormick, United States district judge for the northern district of Texas, of date 27th day of July, 1886, attested by A. J. Houston, with the seal of said circuit court — Dallas, Texas, July 29th, 1886, and that I am not a party to said suit or in any way interested therein, and that the original citation of said copy delivered to said M. L. Crawford is hereunto attached and returned with this my affidavit.

R. C. GOODMAN.

Sworn to and subscribed before me this 29th day of July, 1886.

A. J. HOUSTON,
Clerk U. S. Circuit Court,
By JAS. D. ADAMS, *D'p'ty Clerk.*

(Endorsed:) No. 418. Wolf Bachrack *vs.* A. B. Norton *et al.* Filed July 29th, 1886. A. J. Houston, clerk, by Jas. D. Adams, dep-ty.

43 *Writ of Error. Filed July 29th,* 1886.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said circuit court before you, or some of you, between Wolf Bachrack, as plaintiff in error, and A. B. Norton, A. A. Whissen, James Bentley, Moses Ullman, S. M. Dodd, Marcus Dodd, and Hamilton Doughaday, defendants in error, a manifest error hath happened, to the great damage of said Wolf Bachrack, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with [this] writ, so that you have the same at Washington on the second Monday of October next,

in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

44 Witness the Hon. Morrison R. Waite, Chief Justice of said Supreme Court, the 29th day of July, in the year of our Lord one thousand eight hundred and eighty-six.

A. J. HOUSTON,
Clerk of the Circuit Court of the United States
for the Northern District of Texas, at Dallas.

Allowed by—
—— ——.

(Endorsed:) No. 418. Wolf Backrack, plaintiff in error, *vs.* A. B. Norton *et al.*, def'ts in error. Writ of error. Filed July 29, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

45 In the United States Circuit Court for the Northern District of Texas, at Dallas.

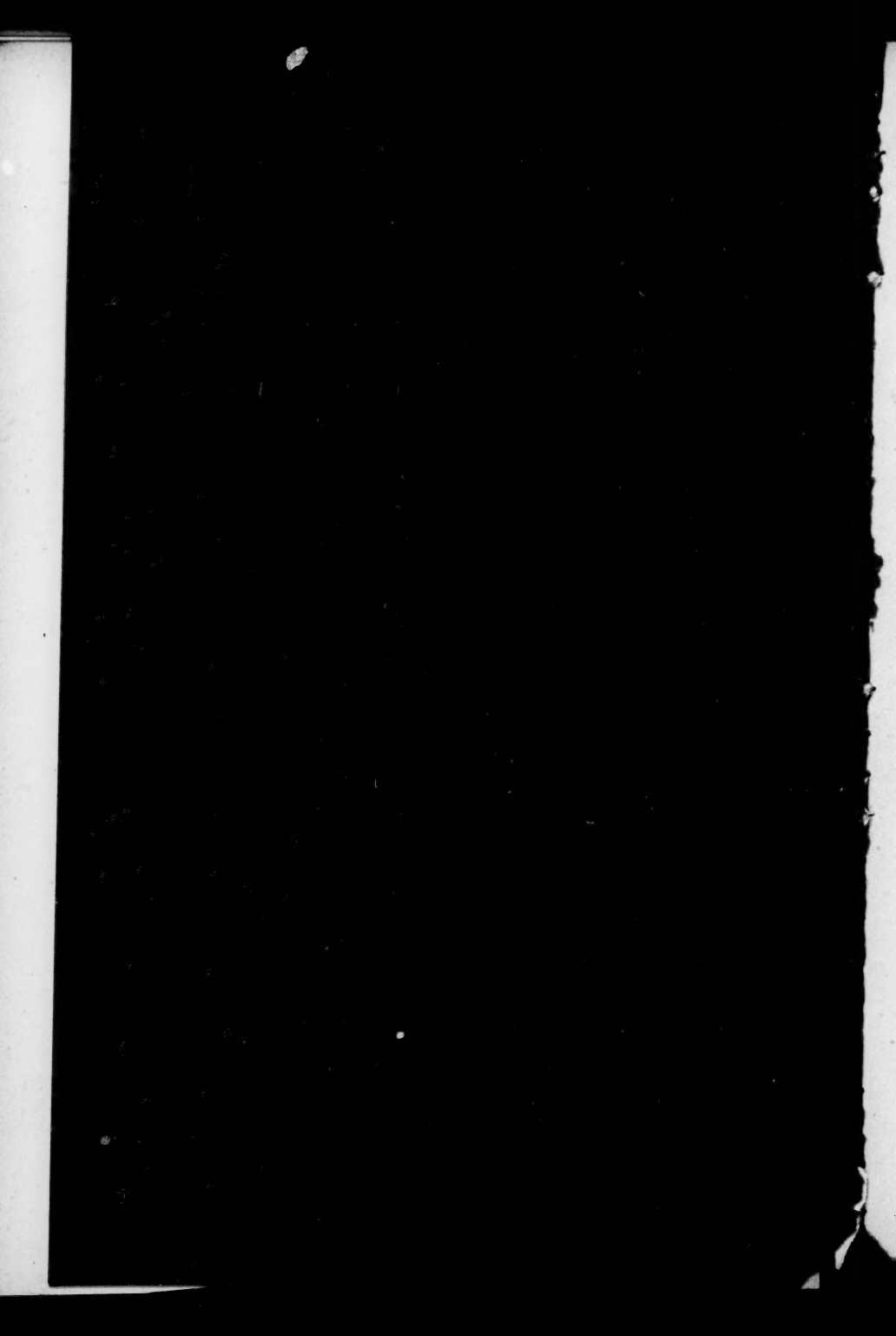
I, A. J. Houston, clerk of the United States circuit court for the 5th circuit and northern district of Texas, at Dallas, do hereby certify that the foregoing forty-*three* pages contain a full, true, and correct transcript of the amended original petition, Exhibits A, B, C, and D, amended original answer, demurrer to defendants' answer, judgment, assignment of errors, petition for writ of error, writ-of-error bond, citation in error, and writ of error, as appears from the records and files in the case of Wolf Bachrack *vs.* Anthony B. Norton *et al.*, No 418 on the dockets of said court.

In testimony whereof I hereunto affix the seal of said court, at Dallas, and the name of the clerk thereof, this the 17th day of September, A. D. 1886.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON,
Clerk of said Court.

Endorsed on cover: [Stamped:] Supreme Court U. S. Received Oct. 4, 1886. Clerk's office. N. Texas C. C. U. S. No. 1067. Wolf Bachrack, plaintiff in error, *vs.* Anthony B. Norton, A. A. Whissen, James Bentley, Moses Ullman, S. M. Dodd, Marcus Dodd, and Hamilton Doughaday. Filed October 4, 1886.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1067.

WOLFF BACHRACK

vs.

A. B. NORTON, ET AL.

BRIEF OF PLAINTIFF IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

STATEMENT OF THE CASE.

This suit was dismissed in the Circuit Court, the judgment being on general demurrer and special exceptions sustained to plaintiff's petition.

The petitioner sets out as his cause of action a seizure and conversion by A. B. Norton, Marshal of the Northern District of Texas, through his Deputy, A. A. Whissen, of a stock of goods, wares and merchandise belonging to plaintiff. The marshal, his bondsmen and deputy were made parties defendant; also Dodd, Brown & Co., attaching creditors, under whose writ and at whose instigation the seizure is alleged to have been made.

The petition contains the usual allegations in such cases, and in addition pleads specially the plaintiff's claim or title to the property, setting forth that he held or owned it by virtue of a deed of assignment made to him by one M. Myerson, against whom the attachment of Dodd, Brown & Co. was sued out, and by virtue of which the property was seized.

The exceptions of the defendants raised the question of the validity of this assignment. The court held the assignment void and sustained the demurrer, and exceptions, and dismissed the suit.

This is the error assigned in the record for which it is asked that the judgment be reversed.

See assignment of error, appendix A.

Brief and Argument.

The single question to be considered by this Court is the validity of the deed of assignment under which the plaintiff held the property seized by the Marshal, a copy of which is attached to the petition (Trans., p. 21) and which is set out in full in the assignment of error.

The Legislature of Texas, Acts of 1879, chapter 53, p. 57 (see appendix to evised Statutes of Texas, page 5) passed a statute providing for and regulating assignments for the benefit of creditors. See Appendix B of this brief for statute in full.

The deed of assignment in this case was made Oct.

22, 1880, under this law, and before any amendment to the same had been made.

The exceptions of the defendant point out but three objections to the deed of assignment upon which the circuit court acted and dismissed plaintiff's petition.

These objections will be considered in the order presented.

"1st. Said assignment shows that at the time it was executed the assignee, Wolff Bachrack, was a non-resident of the State of Texas and was a citizen of the State of Missouri."

There is no provision in the statute of 1879 requiring that the assignee shall reside in the State of Texas, or be a citizen of the State. The only word that can be said to indicate such intention, is found in the sixth section of the act, wherein it provides for the filing of the bond "with the County Clerk of his County," seemingly referring to the county of the assignee. The entire section is as follows:

"Sec. 6. The assignee shall forthwith after the execution and delivery of the deed of assignment cause the same to be recorded as herein provided, and shall execute a bond with sureties to be approved by the judge of the district or county court, conditioned that he will faithfully discharge his duties as such assignee and that he will make proportional distribution of the net proceeds of said estate among the creditors entitled thereto, which bond shall be payable to the State of Texas and and shall be filed with the county clerk of his county

and shall inure to the benefit of the assignor and the creditor or creditors who may maintain an action against such assignee thereon in his or their own name, jointly or severally, for any breach thereof or violation of this law by reason of which such assignor or creditor shall sustain damage, and upon the filing of said bond the assignee shall take possession of the assigned property and proceed to execute the assignment."

After this assignment was made, by an Act March 24, 1883, the Legislature amended this section and as amended it reads as follows:

"Sec. 6. Every such assignee shall be a resident of this State and of the county in which the assignor resides or in which his principal business was conducted, and he shall forthwith after the execution and delivery of the deed of assignment cause the same to be recorded as herein provided in the county of such assignee's res idence, and also in every county in which there is any real property conveyed to him by such deed of assignment, and shall execute a bond with sureties to be approved by the judge of the county court of the county in which the assignee resides, or by the judge of the district court of the judicial district in which such county is situated, conditioned that he will faithfully discharge his duties as such assignee and that he will make pro portional distribution of the net proceeds of the assigned estate among the creditors entitled thereto, which bond shall be payable to the State of Texas and shall be filed with the county clerk of the county in which such

assignee resides, and shall inure to the benefit of the assignor or the creditor or creditors, who may maintain an action thereon against such assignee and sureties in his or their own name, jointly or severally, for any breach thereof or violation of this law by reason of which such assignor or creditor shall sustain damage, and upon the filing of said bond the assignee shall take possession of the assigned property, and proceed to execute the assignment, and if such assignee shall not within five days after the delivery of the deed of assignment execute an approved bond and file the same with the county clerk as herein provided, such assignment shall, nevertheless, take effect as against the assignor and the creditors, and it shall be the duty of the county judge, or judge of the district court aforesaid, upon the application of the assignor or any creditor, and being notified that such bond has not been given, approved and filed to appoint, in writing, another competent assignee who shall, upon the execution of such bond, approved and filed as herein provided, take possession of the assigned property and proceed to execute the assignment. And it is further enacted, that no fraudulent act, intent or purpose of the assignor or assignee shall have the effect to defeat the assignment or to deprive the creditors consenting thereto from the benefits thereof; but any such fraudulent act, intent or purpose on the part of the assignee shall be sufficient cause for his removal as being an unsuitable person to perform the trust, and any consenting creditor may be or become a party to prosecute or defend in any suit or proceeding necessary or proper for the enforce-

ment of the rights under such assignments, or for the protection of the interests of the assigned property." (Amendment in full, see Appendix C.)

Whether under the original or amended section the residence of the assignee in the state is *essential* to the validity of the assignment, has never been decided by the supreme court of Texas. Other questions, however, arising under this statute have frequently been before that court, and the rule of liberally construing the law so as to uphold the validity of assignments, has been uniformly adopted.

It has been held that this statute is not an insolvent law, but that it was created for the better protection of creditors, and presented a mode for the administration of estates of insolvents, under assignments made by the debtors themselves, which would be good at common law independent of statute, and like any other trust could be enforced in a court of equity in the absence of a statute providing a mode of administration.

Keating vs. Vaughn, 61 Tex., p. 524.

In the case of Peggott vs. Shram, 64 Texas, 447, the court say: "The statute was intended for the benefit of creditors as a class, and must be construed so as to give them the intended benefits. The law is not to be construed so as to put it into the power of a single creditor to defeat its designs by issuing an attachment before a *bona fide* assignee can reach the clerk's office and file the deed of assignment. The validity of the assignment does not depend upon the registration etc."

In the case of Windham vs. Patty, 62 Tex., p. 490, in construing the Act of 1879, the court say: "The failure of the assignee to give bond will not invalidate a deed of assignment properly made, or justify an attachment of the property transferred. The remedy of the creditors is to apply for the appointment of another to discharge the trust."

The 14th section, act 1879, provides for the removal of the assignee if he refuses to execute the trust, and the appointment of another by the court. Nothing is said as to the exercise of this power in case of *resignation*. Nevertheless the court holds that a vacancy created by resignation, can be filled by appointment. (Keating vs. Vaughn, supra.) If the assignee is disqualified from executing the trust by reason of being a non-resident, was he not to be removed under this section and another appointed?

In the case of Weider vs. Maddox, Supreme Court of Texas, opinion delivered June 11, 1886, reported in *The Texas Law Review*, vol. 6, No. 24, issued under date of June 16, 1886, the court held an assignment made in Missouri, under a Missouri statute, conveying property in Texas, was valid against attaching creditors in Texas, and this, notwithstanding there was no pretense of a compliance with the Texas statute. The whole proceeding was in Missouri, and manifestly the assignee was a non-resident of this State. In this case the doctrine is again asserted as in the case of Keating vs.

Vaughn, supra, that these assignments are good as common law assignments, independent of statute.

In the case of Boese vs. King, 108. U. S. S. C , p. 379, this court held that an attaching creditor could not attack an assignment made under a New Jersey statute inoperative at the time, on account of the bankrupt act being in force, provided the assignment was good as a common law assignment. It was held that the attaching creditor was a trespasser, and not entitled to attack the possession and claim of the assignee in that way.

But conceding that the Texas Legislature intended to disqualify all other persons than residents of Texas from acting as assignees under this law, would such a statute be constitutional?

In the case of the Farmer's Loan and Trust Company vs. Chicago & Alton Railway Company, the Circuit Court of Indiana held that a state statute which disqalified a non resident from holding property in trust for creditors was unconstitutional and void as in conflict with Section 2, Art. 4 of the Constitution of the United States, which declares: "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

The statute so held unconstitutional reads as follows: "It shall be unlawful for any person, association or corporation to nominate or appoint any person a trustee in any deed, mortgage or other instrument in writing (except wills) for any purpose whatever who shall not be at the time a *bona fide* resident of the State of In-

diana, and it shall be unlawful for any person who is not a *bona fide* resident of the state to act as such trustee," etc.

The court held further in that case: "No court would be expected to hold that the trust deed was void because one of the trustees was not a resident of Indiana. If it be true that the Farmers Loan and Trust Company was not capable of acting as trustee to the extent of taking title to so much of the mortgaged property as was situated within the State, or that its designation as trustee was to that extent inopportune and void, nevertheless the trust deed was valid when executed, and a trust *is never permitted to fail for want of a trustee*, etc."

Federal Reporter, vol. 27, No. 2, p. 146.

That trusts are not permitted to lapse or fail for want of a trustee to execute them, is an elementary principle of law.

We submit that the first objection to the assignment is not well taken.

2. "The assignment was to take effect instanter upon its signing, and the assignee by its terms is directed to take possession of all the property immediately upon the execution of the assignment."

The statute of 1879 and the amendment of 1883 authorizes the assignee to take possession on filing his bond; but it has been held that the failure to give the bond does not affect the validity of the assignment nor justify

Keating vs. Vaughn, 61 Tex., 524.

Weider vs. Maddox, Supreme Court of Texas opinion, June 11, 1886, reported in the Texas Law Review, Vol. 6, No. 24; issued June 16, 1886.

Boese vs. King, Vol. 108, S. C. U. S.

We submit that there can be no objection to this deed on its face, as a common law assignment.

We respectfully submit that the judgment should be reversed, and the cause be remanded.

H. G. ROBERTSON,
SAWNIE ROBERTSON.
Counsel for Plaintiff in error, Wolff Bachrack.

[Appendix A.]

ASSIGNMENT OF ERROR.

Be it remembered, that on the trial of the above entitled cause the plaintiff presented and read to the court his amended original petition filed in this cause December 17, 1883, to which defendants interposed a general demurrer and special exceptions which were sustained by the court; and the plaintiff having declined to amend the cause, was by the court dismissed.

From this action of the court this appeal is taken and assigned as error.

Plaintiff's petition set out as his cause of action a trespass and conversion by A. B. Norton, Marshal of the Northern District of Texas, through his deputy, A. A. Whissen, of a stock of goods, wares and merchandise belonging to plaintiff. The bondsmen of the marshal are made parties defendant, also Dodd, Brown & Co., attaching creditors under whose writ, and at whose instigation, the seizure is alleged to have been made.

The plaintiff plead his title or claim to the property seized, and alleged that he held and owned it by virtue of a deed of assignment made to him by one M. Myerson, against whom the attachment of Dodd, Brown & Co. was sued out, and by virtue of which the property was seized. This deed of assignment was made a part of the petition, and the general and special demurrers of defendants which were sustained, raises the question of its validity. The action of the court in holding the

assignment void and dismissing the petition, is the alleged error, to correct which this writ is prosecuted and which is here and now assigned as error.

The deed of assignment so held void is as follows:

"Know all men by these presents, that J. M. Myerson, of Grayson county, Texas, being largely indebted and insolvent, and being desirous of securing a fair, just and equitable distribution of my property among my creditors, and in consideration of the sum of five dollars to me in hand paid, I have this day bargained, sold and conveyed, and do hereby bargain, sell and convey and assign unto Wolff Bachrack of the County of St. Louis, State of Missouri, all of my property of every kind and wheresoever situated, except such part thereof as is exempt from execution by the laws of Texas; and I do specially so convey and assign to the said Wolff Bachrack, my entire stock of goods, situated in a store on North Travis street, in Sherman, Texas, rented by me from Tom Forbes, Sr., and known as the Dollar Store; also all of my debts of every kind, due or owing me, whether upon notes accepted as open or otherwise; an inventory of the property owned by me will be made out and attached hereto after the execution hereof, but this instrument is to take effect instanter upon the signing hereof and before any inventory is made. This conveyance is, however, an assignment and in trust for the following purposes, to wit: The said Wolff Bachrack is immediately upon the execution of this instrument to take possession of all property herein conveyed; shall

execute a bond, as such assignee, according to the laws of Texas; shall convert all of said property into cash as soon as it can be done consistently with the interest of all parties; shall collect all debts due and shall apply the proceeds of said property and debts to the payment *pro rata* of all my creditors, who will consent to accept their proportion of my estate, and discharge me from their respective claims, and this assignment shall be for the benefit of all such creditors and none others. My said estate to be administered and be paid out in all things in compliance with the laws of Texas governing such assignments.

An inventory of my creditors, in compliance with the law, is hereto attached and made a part of this instrument.

Witness my hand this 22d day of October, 1880.

[Copy.] Signed, M. MYERSON.

[Appendix B.]

CHAPTER LIII.—An act in relation to assignments for the benefit of creditors, and to regulate the same, and the proceedings thereunder.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate, other than that which is by law exempt

from execution, among all his creditors in proportion to their respective claims, and however made or expressed, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged and certified and recorded in the same manner as provided by law in conveyances of real estate or other property.

SEC. 2. The debtor shall annex to such assignment an inventory containing the following statement:

1. A full and true account of all the creditors of such debtor or debtors.

2. The place of residence of each creditor, if known to such debtor or debtors, and if not known, that fact to be so stated.

3. The sum owing to each creditor, and the nature of each debt or demand, whether arising on written security account or otherwise executed.

4. The true cause and consideration of such indebtedness in each case, and the place where such indebtedness arose.

5. A statement of any existing judgment, mortgage, collateral or other security for the payment of any such debt.

6. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law or in equity, and the encumbrances existing thereon, and of all vouchers and securities relating there

to, and the value of such estate according to the best knowledge of such debtor or debtors.

7. An affidavit shall be made by such debtor or debtors, and annexed to and delivered with such inventory or schedule, that the same is in all respects just and true according to the best of such debtor or debtors' knowledge and belief; nothing contained in this act shall affect the assignor's right to retain all such of his property as is by the constitution and the laws of this state exempt from execution, but such list and inventory shall not be conclusive except as against the debtor making the same.

SEC. 3. Any debtor desiring so to do, may make an assignment for the benefit of such of his crediiors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims, and in such case the benefits of the assignment shall be limited and restricted to the creditors consenting thereto; the debtor shall thereupon be and stand discharged from all further liability to such consenting creditors on account of their respective claims, and when paid they shall execute and deliver to the assignee for the debtor, a release therefrom.

SEC. 4. Every assignee shall, within thirty days after the execution of the assignment, give public notice of his appointment in some newspaper printed in the county where the assignor resides, or where his principal business was conducted, or, if no newspaper be printed therein, then in the newspaper published nearest to such

place of residence or business, and which notice shall be published for three successive weeks, and so far as he can, the assignee shall also give personal notice, or notice by mail, to each of the creditors of the assigning debtor.

SEC. 5. The creditors of the assignor consenting to such assignment, shall make known to the assignee their consent in writing, within four months after the publication of the notice provided in the preceding section, and no creditor not assenting shall receive or take any benefit under the assignment; provided, however, that any creditor who had no actual notice of such assignment, may make known his assent at any time before any distribution of assets under the assignment has been made; and provided further, that the receipt by a creditor of any portion of his claim from the assignee, shall be conclusive evidence of the assent of such creditor to the assignment

SEC. 6. The assignee shall forthwith, after the execution and delivery of the deed of assignment, cause the same to be recorded as herein provided, and shall execute a bond with sureties, to be approved by the judge of the district or county court, conditioned, that he will faithfully discharge his duties as such assignee, and that he will make proportional distribution of the net proceeds of said estate among the creditors entitled thereto, which bond shall be payable to the State of Texas, and shall be filed with the county clerk of his county, and shall inure to the benefit of the assignor and

the creditor or creditors, who may maintain an action against such assignee thereon, in his or their own name, jointly or severally, for any breach thereof or violation of this law, by reason of which such assignor or creditor shall sustain damage, and upon the filing of said bond, the assignee shall take possession of the assigned property and proceed to execute the assignment.

SEC. 7. Every creditor, consenting to an assignment shall, within six months from the time of the first publication of the notice of the appointment of the assignee, file with such assignee a distinct statement of the particular nature and amount of his claim against the debtor, which shall be supported by an affidavit of the creditor, his agent or attorney, that the statement is true, that the debt is just and that there are no credits or offsets that should be allowed against the claim, except as shown by the statement, and no creditor shall take any benefit under any assignment whatever, who neglects to file such statement.

SEC. 8. Any creditor not consenting to the assignment may garnishee the assignee for any excess of such estate remaining in his hands, after the payment to the consenting creditors, the amount of their debts and the costs and expenses of executing the assignment.

SEC. 9. All property conveyed or transferred by the assignor, previous to and in contemplation of the assignment, with the intent or design to defeat, delay or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assign-

ment, notwithstanding such transfer; and the assignee, or in case of his neglect or refusal, any creditor or creditors may in his name, upon securing such assignee against cost of liability, sue for, recover, collect and cause the same to be applied for the benefit of creditors as other property belonging to the debtor's estate in the hands of the assignee; but if it shall appear in such action that the purchaser of any such property bought the same of the assignor in good faith and for a valuable consideration, and without any reason to believe that the debtor was conveying or transferring the same with the intent or design aforesaid, such purchaser shall be held to have acquired as against the assignee and creditors aforesaid, a good and valid title to such property.

SEC. 10. No assignment shall be declared fraudulent or void for want of any inventory or list as provided herein; but if such list and inventory be not annexed and verified as provided in this act, it shall be *prima facie* evidence that the assignor has secreted and concealed some portion of the property belonging to his estate from his assignee, unless upon the demand of the assignee or a creditor, such verified inventory and list be furnished to the assignee; and if any assignee or creditor shall have reason to believe that any debtor has concealed any of his property or estate for the purpose of defrauding his creditors, it shall be the duty of the district or county judge, upon application of said assignee or creditor, to cause such debtor to appear

before him, either in vacation or term time, and disclose under oath, any knowledge or information he or she may have relative to any such concealment.

SEC. 11. If any assignor shall secrete or conceal from his assignee any portion of the property belonging to his estate other than that which is exempt from execution; or shall, previous to and in contemplation of the assignment, transfer any property with the intent or design to defraud his creditors, such assignor shall be adjudged guilty of a felony, and upon conviction thereof, shall be punished by imprisonment and labor in the penitentiary for not less than two nor more than five years.

SEC. 12. The statement of a creditor, verified and filed with the assignee as hereinbefore provided, shall be sufficient *prima facie* evidence to justify the assignee in allowing it as a valid claim against the estate, and it shall be so allowed, and such creditor entitled to his proportional share of the debtor's estate, unless the assignor, or other creditor disputing the same shall, within sixty days after the expiration of the time within which the creditors are required by this act to file their statements, institute an action in the district or county court of the proper county to set aside the allowance and to restrain the payment thereon, for which purpose the assignor or any disputing creditor or creditors may have a remedy, jointly or severally, by injunction or other proper action to try the justness and validity of the disputed claim, and if it appears that an action could not

successfully be maintained at law by the creditor against the assignor upon such claim or any disputed part thereof, the same shall be disallowed, in whole or in part, as the case may be, and the assignee restrained from paying the same, or such portion thereof as may be disallowed; and for the information of the assignor and creditors, it is further provided, that the assignee shall allow them, or any of them, to take a copy of any creditor's statement of his claim that has been filed with such assignee as herein provided.

SEC. 13. Claims that are not due may be allowed at their present value, by discounting them at the rate of interest mentioned in the contract, if any, otherwise at the legal rate, and if any creditor holds collateral security of less value than his debt, the value thereof may be estimated by the assignee, and only the difference between such sum and the debt shall be allowed.

SEC. 14. If any assignee becomes unsuitable to perform the trust, refuses or neglects so to do, or mismanages the property, the county judge or judge of the district court may, upon the application of the assignor, or one or more of the creditors, upon reasonable notice, to all parties interested, by publication or otherwise, as such judge may direct, remove such assignee, and in case of vacancy by death or otherwise, shall appoint another in his place, who shall have the same powers and be subject to the same liabilities as the original assignee.

SEC. 15. Whenever any assignee shall have in his

hands funds sufficient to pay ten per cent. of the debts due by the assignor, he shall make a *pro rata* distribution of the same among said creditors, and the assignee shall be entitled to reasonable compensation for his services, and his necessary costs and expenses, including also his attorney's fees, all to be allowed, in case of difference between the parties, by the county judge or judge of the district court.

SEC. 16. Whenever any assignee shall have fully performed the duties of his trust and desires to be finally discharged therefrom, he may make a report of his proceedings under the assignment, showing the moneys and assets that have come into his hands, and how the same have been disbursed and disposed of, the truth of which shall be verified by his affidavit, and such report shall thereupon be filed and recorded in the office of the county clerk of the county in which the assignment is recorded, and no action shall be brought against such assignee by reason of anything done by him under the assignment as shown by his report, unless the same be brought within twelve months from the time of the filing thereof, as aforesaid; and any moneys or funds on hand, shall be deposited in the district court, subject to be paid out upon the decree of said court.

SEC. 17. Every mortgage, deed of trust, or other form of lien attempted to be given by the owner of any stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise and contemplating a continuance of posses-

sion of said goods, and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void.

SEC. 18. Any attempted preference of one creditor or creditors of such assignor, shall be deemed fraudulent and without effect.

Approved March 24, A. D. 1879.

Takes effect ninety days after adjournment.

[Appendix C.]

An Act to amend Sections three (3), six (6), and ten (10), of an act in relation to assignments for the benefit of creditors, and to regulate the same and the proceedings thereunder, approved March 24th, A. D. 1879.

SEC. 1. Be it enacted by the Legislature of the State of Texas, That section three (3) of an act of the Legislature of the State of Texas, entitled "An act in relation to assignments for the benefit of creditors, and to regulate the same and the proceedings thereunder," approved March 24th, 1879, be and the same is hereby amended so that it shall hereafter read as follows, to-wit:

"SEC. 3. Any debtor desiring so to do, may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims, and in such case the benefits of the assignment shall be

limited and restricted to the creditors consenting thereto, and such debtor shall thereupon be and stand discharged from all further liabilities to such consenting creditors on account of their respective claims, and when paid they shall execute and deliver to the assignee for the debtor a release therefrom; provided, that such debtor shall not be discharged from liabilities to a creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor."

SEC. 2. That section six (6) of said act be and the same is hereby amended so that it shall hereafter read as follows, to-wit:

"SEC. 6. Every such assignee shall be a resident of this State and of the county in which the assignor resides, or in which his principal business was conducted, and he shall forthwith after the execution and delivery of the deed of assignment, cause the same to be recorded as herein provided, in the county of such assignee's residence, and also in every county in which there is any real property conveyed to him by such deed of assignment, and shall execute a bond, with sureties, to be approved by the judge of the county court of the county in which the assignee resides, or by the judge of the district court of the judicial district in which such county is situated, conditioned, that he will faithfully discharge his duties as such assignee, and that he will make proportional distribution of the net proceeds of the assigned estate among the creditors entitled thereto,

sheriff, or any constable, commanding the arrest of the persons referred to in the writ or order, to be brought before the judge at a time named, for the purpose of examination, as provided herein, and such examination shall be in writing, and shall be signed by the persons examined, and shall be filed and attested or sworn to with the clerk of the court, wherein the proceedings are pending, for the use of those interested in the estate; provided, nevertheless, that no assignor or debtor shall be prosecuted or punished for any matter or thing disclosed by him on such examination as had above. The costs of such proceedings to be paid out of the estate assigned, or by the applicant for the examination, as the judge in each case may deem right and proper to order.

SEC. 4. The near approach of the close of the session creates an imperative public necessity authorizing the suspension of the rule requiring bills to be read on three several days, and such rule is hereby suspended.

Approved April 7, 1883.

Takes effect ninety days after adjournment.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

WOLF BACHRACK,
Plaintiff in Error,

vs.

ANTHONY B. NORTON, *et al.*,
Defendants in Error.

No. 116.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANTS IN ERROR.

JOHN JOHNS,
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BRIEF FOR DEFENDANTS IN ERROR.

On October 22, 1880, M. Myerson, doing business as a merchant in Sherman, Texas, made an assignment for the benefit of his creditors to Wolf Bachrack, the plaintiff in error, (Record, p. 21). On December 8, 1880, the defendant in error, Anthony B. Norton, being then the United States Marshal of said district, levied upon the assigned property, which was in the possession of said Bachrack, under a writ of attachment issued at the suit of Messrs. Dodd, Brown & Co., merchants, of St. Louis, Missouri, against said Myerson, (pp. 3–5). This suit is for damages for this alleged wrongful seizure of said property. A special exception to the petition was filed,

alleging that the assignment was void on its face, (p. 23), and said exception was sustained by the circuit court, and the suit dismissed, (p. 24).

It was urged in the court below that there were several reasons why the deed of assignment was void on its face, only one of which will be insisted upon in this Court, to wit, *that the assignee was not a resident of the State of Texas.* This was the ground upon which the circuit judge decided the case.

The deed of assignment and the petition both show that the assignee was a resident and a citizen of Missouri, and the petition further shows that at date of the seizure the assigned property was in the possession of an agent of the assignee.

First. This assignment was made under Section 3 of an act of the legislature of Texas approved March 24, 1879, (Rev. Stat. 1879, App. p. 5), regulating assignments for the benefit of creditors. Said statute does not in terms declare that the assignee shall be a resident of the State of Texas, but such is the plain implication from its several provisions. The scheme of the statute requires that it shall be executed "in the county where the assignor resides, or where his principal business was conducted," (Secs. 4, 10, 12, 16), and it places the assignee under the direction and control of "the judge of the district or county court," (Secs. 6, 14, 15). This court is also (Sec. 12) denominated "the district or county court of the proper county," by which is evidently meant the county of the debtor's residence or principal place of business.

That the assignee must be resident in the State of Texas is also the necessary construction of the language of Sec. 6 of the act, the pertinent parts of which are as follows:

"The assignee shall forthwith, after the execution and delivery of the deed of assignment, . . . execute a bond with sureties, to be approved by the judge of the district or county court, . . . which bond shall be payable to the State of Texas, and shall be filed with the county clerk of *his* county."

The word "his" in this section necessarily refers to the assignee. The context shows that the bond is to be approved by the judge of "*the*" district or county court, that is, of "the county where the assignor resides, or where his principal business was conducted," (Sec. 4). Wherefrom it follows that "his (the assignee's) county" must also be the county of the assignor's residence or principal place of business, and therefore in the State of Texas. This provision is now precise, by virtue of the act of April 7, 1883, (Gen. Laws, 1883, p. 47), amending Sec. 6 as follows: "Every such assignee shall be a resident of this State, and of the county in which the assignor resides."

Since the statute required the assignee to be a resident of Texas, and since the plaintiff in error was not a resident of Texas, *he was incompetent to take under the deed.* The defect is fatal, for the statute provides no remedy. The provision for the assignee's removal when he "becomes" unsuitable, (Sec. 14), contemplates an original capacity to acquire title to the assigned property. *Since title remained in the debtor,* in this instance, the property was subject to the attachment and levy complained of.

The question at issue in the case at bar has not been discussed or decided by the Supreme Court of Texas. But that court has in a number of cases very clearly defined its views to the effect that a deed of assignment is void if it is against the statute, when the statute is silent as to the remedy. It has held assignments void for defect in the *assignors* and in the *assigned property,*

(Donoho *v.* Fish Bros., 58 Tex., 164; McWilliams *v.* Cornelius Bros., 66 Tex., 301; Stitt *v.* Focke, 66 Tex., 715). It has said that the statute requires that the assignor "shall actually make a conveyance . . . *which shall be sufficient to convey the property,*" (Piggott *v.* Schram, 64 Tex., 447). It has said that, to withdraw the property from attaching creditors, the assignment must be made "*in accordance with the laws of this State,*" (McKee *v.* Coffin, 66 Tex., 304). It has said: "We have no right to engraft upon the statute *any conditions or provisions not placed there by the legislature,*" (Duncan Wyatt & Co. *v.* Taylor, 63 Tex., 645). And in the leading case sustaining an otherwise fraudulent assignment under the statute, it has expressly limited its ruling to the case of a good conveyance: "*If the property passes to the assignee,* no provision which the assignor can make in the deed can interfere with the distribution of the estate," (Keating *v.* Vaughn, 61 Tex., 518).

It is a well-settled rule that a deed of assignment against the policy or terms of a statute is void against non-consenting creditors.

Burrill on Assignments, Sec. 352.
Jaffrey *v.* McGehee, 107 U. S., 365.
Schoolfield *v.* Johnson, 11 Fed. Rep., 297.
Heelan *v.* Hoagland, 10 Neb., 511.
Bonns *v.* Carter, 20 Neb., 566.
Edwards *v.* Mitchell, 1 Gray, 239.
Pike *v.* Bacon, 21 Me., 280.
Raleigh *v.* Griffith, 37 Ark., 153.
Churchill *v.* Whipple, 41 Wis., 611.
Keevil *v.* Donaldson, 20 Kas., 168.
Henderson *v.* Pierce, (Ind.), 7 West. Rep., 261.

Second. The following cases are not dissimilar in principle to the case at bar.

In Klauber *v.* Charlton, 47 Wis., 564, it appears that the statute regulating assignments for the benefit of creditors contemplated that the sureties to the assignee's bond should be freeholders of the State, and the court ruled that "the sureties upon the assignee's bond are not responsible or sufficient unless they are freeholders of the State," and that the want of such qualification would in a proper case avoid the deed of assignment.

In Hart *v.* Anthony, 15 Pick., 445, a non-resident assignee, who had undertaken to administer the trust, was held notwithstanding to be not liable to trustee process. The syllabus of the case reads as follows:

"In general, a person who is not and never has been a resident within this Commonwealth, is not liable to the trustee process; and the fact that he came here and took an assignment of the property of an insolvent debtor residing here, in trust for the payment of creditors, does not take the case out of the general rule."

Ex parte Mossness, 39 Wis., 509; the court refused Mossness admission to the bar, on the ground that he was a non-resident, and because an attorney was an officer of the court and a *quasi* officer of the State.

Third. There are two cases referred to in the brief of the plaintiff in error, which are clearly irrelevant in the light of the facts.

Weider *v.* Maddox, 66 Tex., 372, is erroneously cited as ruling a principle which covers the case at bar. It was the case of an assignment in Missouri, to a resident of that State, and included certain property in Texas. *It did not purport to be made under the Act of* 1879, and consequently its validity under said act was not called in question. It was given effect as a common

law conveyance, under the rule of inter-State comity; and even then the court said of it, (p. 378), that it must be "such in form and manner of execution as is required by the laws of this State to pass title."

Farmers Loan and Trust Co. *v.* Chicago and Alton R'y Co., 27 Fed. Rep., 146, is cited on the proposition that, conceding that the Act of 1879 required the assignee to be a resident of Texas, it was unconstitutional. Said case was one in which it appeared that the Chicago and Alton Railway Company had executed a mortgage to the Trust Company, residing in New York, to secure an issue of its bonds, and afterwards attempted to repudiate the trust on the ground that a statute of Illinois forbade a non-resident trustee from holding property in that State. The statute attempted to divest a non-resident trustee of a right valid at common law, and the learned judge asserted its unconstitutionality for that reason. But it is plain that the ruling, if more than mere argument, is irrelevant to the case at bar, where the assignor has chosen to act under a statute of the State of Texas, and in the matter of an assignment for the benefit of his creditors, which has been regarded in both the Federal and State courts as peculiarly within the scope of local legislation. It is not unusual for statutes regulating such assignments to require that the assignee shall be a resident of the State, and the constitutionality of such provisions seems to be unquestioned, (Burr. on Ass., Sec. 91; see Klauber *v.* Charlton, 47 Wis., 564, 569).

Fourth. The appointment of an incompetent assignee has long been regarded as a ground for avoiding an assignment.

Burrill on Assignments, Sec. 518.

Bishop on Insolvent Debtors, Sec. 123.

In Cram *v.* Mitchell, 1 Sandf. Ch., 251, the assignment was declared void for this cause. As in the case at bar, there was a non-resident assignee, otherwise competent, *who had employed an agent to represent him.* Commenting on these facts, the Vice Chancellor said:

"In the case before me, the only assignee who appears to have been competent to act as such was precluded by his distant residence from taking any part in the execution of the trust. The property was here; here it was to be collected, sold, converted into money, and applied to the debts. Here the accounts were to be kept. Allen lived in Philadelphia. So conscious was he of the impossibility of his acting efficiently in the matter, that he delegated the care of his own interests to Nones. If he would take that course for his own protection, it needs no argument to convince me that the same course was necessary for the protection of the fund for the benefit of others."

For the foregoing reasons, it is submitted that the judgment of the Circuit Court in this cause should be affirmed.

Respectfully submitted:

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